FEE COPY

FEB 25 1950

CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 569

HENRY M. BEVERAGE, Administrator of the Estate of Dennis Roscoe Beverage, Deceased, CLARENCE BERLIN BEVERAGE, HILDA LOUISE GUM, MARGIE H. SIMMONS, Administratrix of the Estate of James Edward Simmons, Deceased, and JANIE HELMICK GUM, Administratrix of the Estate of Dorothy Mae Helmick, Deceased,

Petitioners,

v.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY IN OPPOSITION

WAYT B. TIMBERLAKE, JR.,
Staunton, Virginia
ROBERT LEWIS YOUNG,
Richmond, Virginia
Attorneys for Respondent.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Restatement of the Questions Presented	2
Restatement of the Case	2
Argument	3
A. In a Case of this Kind, Devoid of any Very Exceptional Circumstances, this Court Will Refuse Certiorari to Review a Judgment of a Court of Appeals Remanding a Case to a District Court for a Trial on the Merits	3
B. The Judgment of the Court of Appeals Relative to Coverage under Respondent's Policy is not in Conflict With the Local Law	4
C. The Judgment of the Court of Appeals Relative to the Inconclusiveness of Petitioners' Judgments against Wagner upon the Issue of Insurance Coverage is not in Conflict with the Local Law	6
Conclusion	9

CITATIONS

Cases

Page

Accident Corp. v. Washington Co., 148 Va. 829, 139 S.E. 513 7

Aetna Life Ins. Co. of Hartford, Conn. v. Maxwell, 89 F. (2d) 988 (CCA 4th) 8

Alabama Title & Trust Co. v. Millsap, 71 F. (2d) 518 (CCA 5th) 8

Allebaugh v. Coakley et als, 75 Va. 628 7

American Constr. Co. v. Jacksonville, Etc. R. Co., 148 U. S. 372 4

Arnold v. United States, 263 U. S. 427 4

B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709 (CCA 8th) 8

Chicago, Etc. R. Co. v. Osborne, 146 U. S. 354 4

Crawford et als v. Turk, Sheriff, 24 Gratt. (65 Va.) 176 7

Employers' Liability v. Taylor, 164 Va. 103, 178 S. E. 772 7

George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 498 8

Hamilton-Brown Shoe Co. v. Wolf, 240 U. S. 251 4

Henrico Justices ex rel. Craddock v. Turner's Adm'x., 6 Leigh (33 Va.) 116 6

Hunter v. Hollingsworth, 165 Va. 583, 183 S. E. 508 6

Huntington Cab Co. v. American Fidelity & Casualty Co., 155 F. 2d 117 (CCA 4th) 5

Indemnity Co. v. Davis' Adm'r., 150 Va. 778, 143 S.E. 328 .....6, 7

Indemnity Co. v. Small, Adm'x., 154 Va. 458, 153 S.E. 685 7

International Indemnity Co. v. Steil, 30 F. (2d) 654 (CCA 8th) 9

Jones v. Zurich General Accident and Liability Ins. Co., 121 F. (2d) 761 (CCA 2nd) 8

Kemper v. Kemper, 3 Rand. (24 Va.) 8 5

Land v. Dollar, 330 U. S. 731 4

London Guar. Co. v. White & Bros., 188 Va. 195, 49 S.E. 2d 254 7

Page

Panama R. Co. v. Napier Shipping Co., 166 U. S. 280 4

Richmond v. Sitterding, 101 Va. 354, 43 S.E. 562 6

Sheehan v. Goriansky, 321 Mass. 200, 72 N.E. 2d 538, 173 A.L.R. 497 5

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 4

State Farm Ins. Co. v. Arghyris, 189 Va. 913, 55 S.E. 2d 16 6

State Farm M. Auto. Ins. Co. v. Coughran, 303 U. S. 485 8

Title Corp. v. Tie Co., 152 Va. 698, 148 S.E. 815 6

Washington Gas Co. v. District of Columbia, 161 U. S. 316 6

Western Indemnity Co. v. Crafts, 140 Fed. 1 (CCA 6th) 8

TEXT AUTHORITIES

5 Am. Jur. 796, Tit. Automobiles, Sec. 518 5

111 A.L.R. 1043 5

117 A.L.R. 1175 5

Appleman, Insurance Law and Practice, Vol. 7, p. 76, Sec. 4312 5

3 C.J. 592, Tit. Appeal and Error, Sec. 429 4

31 C.J. 425, Tit. Indemnity, Sec. 17 5

4 C.J.S. 326, Tit. Appeal and Error, Sec. 152 4

42 C.J.S. 573, Tit. Indemnity, Sec. 7 5

45 C.J.S. 887, Tit. Insurance, Sec. 829 5

Statutes

Code of Virginia (Michie) 1950, Sec. 38-238 5

Code of Virginia (Michie) 1950, Secs. 46-386—46-501 (Virginia Motor Vehicle Safety Responsibility Act) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 569

HENRY M. BEVERAGE, Administrator of the Estate of Dennis Roscoe Beverage, Deceased, CLARENCE BERLIN BEVERAGE, HILDA LOUISE GUM, MARGIE H. SIMMONS, Administratrix of the Estate of James Edward Simmons, Deceased, and JANIE HELMICK GUM, Administratrix of the Estate of Dorothy Mae Helmick, Deceased, *Petitioners,*

v.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY IN OPPOSITION

OPINIONS BELOW

References to the official reports of the opinions delivered in the courts below are correctly set forth by the petitioners (Pet., p. 1).

JURISDICTION

The respondent agrees that jurisdiction of this Court exists under the section of the Judicial Code cited by the petitioners (Pet., p. 1).

RESTATEMENT OF THE QUESTIONS PRESENTED

Since the respondent does not entirely agree with the petitioners' statement of the questions presented, they are given below in accordance with its views:

1. In a matter of private litigation, will this Court grant certiorari to a judgment of a Court of Appeals remanding a case to the District Court for a trial on the merits?

2. Are judgments awarded against an insured, on account of his intentional act, within the coverage of an automobile liability policy insuring against liability imposed by law for damages caused by accident and providing in one of its conditions that assault and battery shall be deemed an accident unless committed by or at the direction of the insured?

3. Is an automobile liability insurer precluded from asserting a policy defense by judgments in prior actions by injured third parties against its insured when the grounds of its policy defense were not, and could not have been, litigated in the prior actions?

RESTATEMENT OF THE CASE

Supplementing petitioners' statement of the case, it may be observed that the District Court expressly refrained from saying what his ruling would have been upon the issue of insurance coverage had he been permitted, under his view

of the law, to inquire into the question as to whether Wagner's act resulting in the petitioners' several judgments was negligent or intentional (R. p. 30). His decision was based upon his conclusion that the respondent was estopped to assert that Wagner's act was intentional, in view of the fact that the petitioners' several judgments were awarded in actions in which only negligence had been charged and in which the verdicts resulting in the judgments were rendered pursuant to instructions dealing only with negligence (R. pp. 20, 21, 42). In the Court of Appeals the petitioners urged, as an additional ground for affirmance to serve in the event that the basis of the decision in the District Court be found erroneous, their contention now again made to the effect that insurance coverage existed even if Wagner's act was intentional. In reversing and remanding to the District Court for a trial upon the issue of fact regarding the character of Wagner's act the Court of Appeals decided, as it was necessary for it so to do, both questions of law, namely, first, that no insurance coverage existed under respondent's policy if Wagner's act was in fact intentional (R. pp. 36-40), and, second, that the respondent was not estopped to establish as a fact, if it could, that Wagner's act was intentional (R. pp. 42-47).

ARGUMENT

A. In a Case of this Kind, Devoid of any Very Exceptional Circumstances, this Court Will Refuse Certiorari to Review a Judgment of a Court of Appeals Remanding a Case to a District Court for a Trial on the Merits.

Quite apart from the consideration concerning the correctness of the judgment of the Court of Appeals, there arises the preliminary question as to whether or not petitioners' application to this Court is not premature. The general

rule is, of course, that a court of last resort will not review on appeal or writ of error a judgment of an intermediate court reversing the judgment of an inferior court and ordering a new trial. 4 C.J.S. 326, Tit. Appeal and Error, Sec. 152; 3 C.J. 592, Tit. Appeal and Error, Sec. 429. That rule obtains in this Court. *Arnold* v. *United States,* 263 U. S. 427. Certiorari has been granted by this Court to avoid further futile proceedings in a District Court lacking jurisdiction or to decide a question of great importance involving the District Court's jurisdiction. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *Land* v. *Dollar,* 330 U. S. 731. The general practice here has been, however, in the absence of some very exceptional circumstance, to refuse certiorari until the whole case has been developed, reviewing at that time any errors in the judgment of the Court of Appeals remanding the case to the District Court for further proceedings. *Hamilton-Brown Shoe Co.* v. *Wolf,* 240 U. S. 251; *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280; *American Constr. Co.* v. *Jacksonville, Etc. R. Co.,* 148 U. S. 372; *Chicago, Etc. R. Co.* v. *Osborne,* 146 U. S. 354.

Here, it is submitted, the petitioners should await the final determination of the case in the lower courts and, if unsuccessful, then seek a review in this Court with the record in such state that this Court, if it should then grant certiorari, might be in a position to enter final judgment, thus avoiding piece-meal review.

B. The Judgment of the Court of Appeals Relative to Coverage under Respondent's Policy is not in Conflict With the Local Law.

There appears to be no decision of the Virginia Supreme Court of Appeals specifically deciding whether an intentional act on the part of an insured under an automobile public

liability policy is within the phrase "caused by accident" appearing in the insuring clause. In the absence of such a decision it must be assumed that the local law is in accordance with the general rule recognized by the courts which have considered the point. Under this rule the consequences of an intentional act on the part of the insured himself are not covered. *Huntington Cab Co.* v. *American Fidelity & Casualty Co.,* 155 F. 2d 117 (CCA 4th); *Sheehan* v. *Goriansky,* 321 Mass. 200, 72 N. E. 2d 538, 173 A. L. R. 497; *Appleman, Insurance Law and Practice,* Vol. 7, p. 76, Sec. 4312; 45 C. J. S. 887, *Tit. Insurance,* Sec. 829; 5 *Am. Jur.* 796, *Tit. Automobiles,* Sec. 518; and Annotations 111 *A. L. R.* 1043, 117 *A. L. R.* 1175.

The conclusion of the Court of Appeals to the effect that "the policy in suit could not legally cover and was not intended to cover such conduct as Wagner was guilty of, or to idemnify him for the consequences of his crime" (R. p. 36), would seem to be universally supported by the authorities. 42 *C. J. S.* 573, *Tit. Indemnity,* Sec. 7; 31 C. J. 425, *Tit. Insurance,* Sec. 17. This principle that a contract to indemnify for the consequences of a future criminal act would be void upon the grounds of public policy is recognized in Virginia. *Kemper* v. *Kemper,* 3 Rand. (24 Va.) 8. This principle, of itself, would preclude adoption of the petitioners' construction of the insuring clause in respondent's policy.

Neither Section 38-238 of the Code of Virginia (Michie) 1950, nor the Virginia Motor Vehicle Safety Responsibility Act (Sections 46-386 to 46-501 of the Code cited) have changed the public policy of Virginia concerning the point here at issue. The former merely subrogates the injured party to the rights of the insured and allows the maintenance of an action, in certain cases, by such injured party against the insurer under the terms of the policy, as the

Court of Appeals correctly held (R. p. 47). In so doing it applied the local law, which holds that the judgment creditors have the same rights as the insured and nothing more. *State Farm Ins. Co.* v. *Arghyris,* 189 Va. 913, 55 S. E. 2d 16; *Hunter* v. *Hollingsworth,* 165 Va. 583, 183 S. E. 508; *Indemnity Co.* v. *Davis' Adm'r.,* 150 Va. 778, 143 S. E. 328. In holding that the public policy of Virginia in this regard had not been affected by the latter statute (R. p. 40), the Court of Appeals correctly interpreted the local law, as was later decided by the Supreme Court of Appeals of Virginia. *State Farm Ins. Co.* v. *Arghyris, supra.*

C. The Judgment of the Court of Appeals Relative to the Inconclusiveness of Petitioners' Judgments against Wagner Upon the Issue of Insurance Coverage is not in Conflict with the Local Law.

While the courts of Virginia recognize the general rule, usually incompletely stated to the effect that an indemnitor is bound by the judgment in the action by the third party against the indemnitee, the reason given for the rule is that the indemnitor "has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record." *Title Corp.* v. *Tie Co.,* 152 Va. 698, 148 S. E. 815, quoting from the opinion in *Washington Gas Co.* v. *District of Columbia,* 161 U. S. 316. But under Virginia law, as would appear to be the law everywhere, persons responsible over, by contract or by operation of law, are not true privies to the judgment debtor. *Richmond* v. *Sitterding,* 101 Va. 354, 43 S. E. 562. If responsible over by contract the principle of estoppel cannot be invoked to bind them beyond the terms of their undertaking. *Henrico Justices ex rel. Craddock* v. *Turner's Adm'x.,* 6 Leigh (33 Va.) 116. It is only where by the terms of the contract of indem-

nity the indemnifying party has agreed to pay any judgment against the indemnitee, without restriction, that such judgment will be treated as absolutely conclusive of the liability over. *Crawford et als* v. *Turk, Sheriff,* 24 Gratt. (65 Va.) 176. If the matters at issue in the action against the indemnitor were not submitted to the jury finding a verdict against the indemnitee, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh* v. *Coakley et als,* 75 Va. 628.

In accordance with local practice in Virginia, when the insured is sued by the injured third party, the defense of that action can only be made in the name of the insured. The question as to whether or not the insurer is liable to the injured party can be litigated only after he has obtained judgment against the insured. *Employers' Liability* v. *Taylor,* 164 Va. 103, 178 S. E. 772. When action is brought to determine the liability of the insurer, the injured third party is not to be considered as suing upon his judgment against the insured, but as suing upon the contract of insurance, to which suit the insurer may make any defense which it could have made had the insured paid the judgment and brought an action for reimbursement. *Indemnity Co.* v. *Davis' Adm'r., supra.* If the original action against the insured is upon a claim not insured against by the policy, the duty of the insurer is to refrain from interfering in any way with the insured in respect to his defense of the case. *Accident Corp.* v. *Washington Co.,* 148 Va. 829, 139 S. E. 513. When suit is brought against the insurance company the first question always is, has the plaintiff a judgment "against a party who clearly comes within the provisions of the policy fixing the status of an insured"? *Indemnity Co.* v. *Small, Adm'x.,* 154 Va. 458, 153 S. E. 685.

The case of *London Guar. Co.* v. *White & Bros.,* 188 Va. 195, 49 S. E. 2d 254, is authority for the respondent, not

the petitioners. In that case the injured party's complaint against the insured alleged a claim within the policy, but the insurer mistakenly refused to defend. After settling with the injured party the insured sued for reimbursement. The Supreme Court of Appeals of Virginia held the insurer liable because it turned out, on full development of the facts in the action on the policy, that the loss was one insured against.

While it is thought to be perfectly clear that this case is governed by local, rather than by federal, law, it would seem immaterial to pursue that question at any length. This Court has held that an indemnitor is not estopped to show the true facts in relation to an issue not involved in an action against his indemnitee. *State Farm M. Auto. Ins. Co.* v. *Coughran,* 303 U. S. 485; *George A. Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489. The Courts of Appeal of the various Circuits follow the same rule. *Ætna Life Ins. Co. of Hartford, Conn.* v. *Maxwell,* 89 F. (2d) 988 (CCA 4th); *Western Indemnity Co.* v. *Crafts,* 140 Fed. 1 (CCA 6th). The cases cited by the petitioners as being indicative of a conflict (Pet. p. 8) do not support that contention. In *Jones* v. *Zurich General Accident and Liability Ins. Co.,* 121 F. (2d) 761 (CCA 2nd), the insurer waived its policy defense. In *Alabama Title & Trust Co.* v. *Millsap,* 71 F. (2d) 518 (CCA 5th), the facts upon which one aspect of coverage depended were directly at issue in the action against the insured and the conclusive existence of such facts was conceded on appeal. In *B. Roth Tool Co.* v. *New Amsterdam Casualty Co.,* 161 Fed. 709 (CCA 8th), the liability to indemnify was as broad as the liability of the insured to the injured party and the very ground on which coverage under the policy depended was at issue and fully litigated in the first action. The report of *International*

Indemnity Co. v. *Steil,* 30 F. (2d) 654 (CCA 8th), does not disclose any defense on the part of the insurer.

CONCLUSION

While it is believed that it would be contrary to the practice in this Court to grant a writ of certiorari in this case at this stage, that is, before the trial on the merits in the District Court, the writ prayed for should be denied in any event upon the ground that the Court of Appeals correctly interpreted and applied the law of Virginia to the issues presented before it. The respondent could not have litigated the question as to whether Wagner's act was negligent or intentional in the actions in which the petitioners' several judgments were awarded and it is entitled to its day in court on that issue.

Respectfully submitted,

WAYT B. TIMBERLAKE, JR.,
Staunton, Virginia

ROBERT LEWIS YOUNG,
Richmond, Virginia

Attorneys for Respondent.